LEMBAGA TABUNG HAJI

v.

METROWANGSA ASSET MANAGEMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-21-22-2002]
18 SEPTEMBER 2002

CIVIL PROCEDURE: *Contempt of court - Breach of terms of court order - Proof of contempt - Apology of contemnor - Whether acceptable to court - Magnanimity of court*

This was an application by the plaintiff to commit the 2nd defendant to prison for contempt of court for failing to comply with an earlier order of the court directing him to, *inter alia*, swear an affidavit disclosing to the plaintiff the total value of his assets with full particulars. In resisting the application, the 2nd defendant contended that the confiscation of all the material documents from his residence and office by the investigators from the central bank had frustrated all his sources of reference and, thus, made it impossible for him to comply with the said order of the court.

Held:

[1] The 2nd defendant should have promptly affirmed an affidavit (alluding to the seizure of his documents by the investigators from the central bank) and filed it in court before the expiry of the seven days within which he had to do so. He did not do so and was, certainly, in contempt of court. Nevertheless, the apology tendered by the 2nd defendant from the witness box was acceptable to the court. (pp 587 c, e & 588 b-f)

[Plaintiff's application for order of committal denied; 2nd defendant's apology accepted; 2nd defendant directed to fully comply with earlier order of court.]

Case(s) referred to:
AG v. Times Newspapers Ltd [1974] AC 273 ***(refd)***
AG v. Times Newspapers Ltd [1992] 1 AC 191 ***(refd)***
Dean v. Dean [1987] 1 FLR 517 ***(refd)***
Gur Diyal v. Sukhnandan Lal [1929] AIR Allahabad 236 ***(refd)***
Hadkinson v. Hadkinson [1952] 2 All ER 567 ***(refd)***
Heatons Transport (St Helens) Ltd v. Transport and General Workers' Union [1973] AC 15 ***(refd)***
Howitt Transport v. Transport and General Worker's Union [1973] 1 CR 1 ***(refd)***
Knight v. Clifton [1971] Ch 700 ***(refd)***
Lee Chan Leong v. Jurutera Konsultant (SEA) Sdn Bhd & Ors [2002] 4 CLJ 1 ***(foll)***
Murray Hiebert v. Chandra Sri Ram [1999] 4 CLJ 65 ***(refd)***

Re Bramblevale, Ltd [1969] 3 All ER 1062 ***(refd)***
Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor [1993] 4 CLJ 177 ***(foll)***
Sukumaran Ramasamy v. Selva Rani Raman [1999] 5 CLJ 458 ***(foll)***
Tiu Shi Kian & Anor v. Red Rose Restaurant Sdn Bhd [1984] 1 CLJ 325; [1984] 2 CLJ (Rep) 543
Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 52 rr. 2(2), 5(4)

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol 2, p 75

For the plaintiff - Shahul Hameed Amirudin (Woo Lai Mei & Syed Shafiq Alhabshi); M/s Zul Rafique & Partners
For the 1st defendant - Mohd Ariff Yusoff; M/s Cheang & Ariff
For the 2nd defendant - Shahruddin Osman (Baharin Rejab); M/s Othman Hashim & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Malik Ishak J:

Introduction

By way of a notice of motion, the plaintiff moved this court to commit the second defendant to prison for contempt and that notice of motion can be seen in encl. 39 and the prayers therein were framed in this fashion:

> 1. The said abovenamed 2nd Defendant, Ahmad bin Hassan, be committed to prison for his contempt of this Honourable Court in failing to comply with the terms of the Order made by this Honourable Court on 13th March 2002 pursuant to which the 2nd Defendant abovenamed was required by this Honourable Court, *inter alia*, to:
>
> 1.1. disclose to the Plaintiff, by way of a sworn affidavit within 7 days from receipt of the said Order, the full value of his respective and/or joint assets, identifying with full particularity the nature and details of all such assets and their whereabouts whether within the jurisdiction or otherwise and whether held in his own name or by nominees or otherwise on his behalf and whether solely or jointly owned; and
>
> 1.2. to disclose to the Plaintiff the source of his monies for each and every time he intends to spend a sum exceeding RM1,000.00 a week for each of his ordinary living expenses and RM1,000.00 a week towards his ordinary and proper business expenses and also RM1,000.00 a week for legal advice and representation;

2. The said abovenamed 2nd Defendant, Ahmad bin Hassan, do pay the Plaintiff's costs of, and incidental to this application and also of the issuing and execution of any order to be made herein; and

3. Such further and/or any other relief or consequential directions or orders that this Honourable Court deems fit and just be made.

Enclosure 39 was supported by an affidavit of Ismee bin Ismail that was affirmed on 18 July 2002 as seen in encl. 38. There was also a statement made pursuant to O. 52 r. 2(2) of the Rules of the High Court 1980 ("RHC") and this can be seen at p. 35 to p. 37 of encl. 38 which was drafted in the Malay language while its translation can be seen at p. 38 to p. 40 of the same enclosure.

In response to encl. 38 was an affidavit in reply filed by the second defendant, namely, Ahmad bin Hassan, which was affirmed on 13 September 2002 and it can be seen in encl. 47.

The notice of motion in encl. 39 together with the affidavit of Ismee bin Ismail in encl. 38 and the affidavit in reply of the second defendant in encl. 47 were case managed by my brother judge Dato' James Foong and eventually they were sent to me on 17 September 2002 in my capacity as a fast-track judge. This was the first fast track case ever assigned to me. Expediency was the order of the day and so I mounted the bench on 18 September 2002 as scheduled by Dato' James Foong and heard encl. 39. In open court, my attention was drawn to another additional affidavit styled as the supplementary affidavit that was affirmed by the second defendant on 18 September 2002 (it should be 17 September 2002 because the date of filing as seen from the praecipe was on 17 September 2002 at 2.32pm) and I caused that supplementary affidavit to be marked as encl. 48. I was indeed surprised that encl. 48 was filed at the last minute. But Mr. Shahul Hameed Amirudin assisted by Miss Woo Lai Mei and Mr. Syed Shafiq Alhabshi magnanimously agreed that encl. 48 be considered by this court in adjudicating encl. 39. Mr. Shahul Hameed Amirudin also informed this court that he would not be responding to encls. 47 and 48 and implored this court to proceed with the hearing of encl. 39. I merely took note of what he said and proceeded to hear encl. 39 forthwith.

Facts Of The Case

The plaintiff, Lembaga Tabung Haji, is and was at all material times a body corporate duly incorporated in Malaysia pursuant to the Tabung Haji Act 1995 and has its principal place of business at Bangunan Tabung Haji, 201 Jalan Tun Razak, 50732 Kuala Lumpur. The second defendant by the name of Ahmad bin Hassan is an individual and he purports to be a foreign exchange trader and he also purports to carry on the business of buying and selling of

foreign currency either over a short or long term period for profit for and on behalf of other individuals or companies and he has a last known address at number 14E, Mahsuri apartment, Taman Setiawangsa, 54700 Kuala Lumpur.

The grounds on which the committal of the second defendant were sought were basically based on the failure of the second defendant to comply with the order of this court dated 13 March 2002. Now, for clarity the order of this court dated 13 March 2002 was in these terms:

ORDER

UPON THE APPLICATION of the Plaintiff abovenamed AND UPON READING the Summons in Chambers dated 15th February 2002 and the Affidavit of Ismee bin Ismail affirmed on 15th February 2002 filed herein AND UPON HEARING Mr. Nahendran Navaratnam (Ms. Janini Rajeswaran with him) Counsel for the Plaintiff AND IN THE PRESENCE of Mr. Shahruddin Osman (Mr. Baharin Rejab with him) appearing for the 2nd Defendant AND the Plaintiff by their counsel undertaking:

(a) To obey any Order this Honourable Court or the Judge may make as to damages in case the Court shall hereafter be of the view that the 2nd Defendant shall have sustained any by reason of this Order which the Plaintiff ought to pay;

(b) To pay the reasonable costs incurred by any person other than the Defendants to whom notice of this Order may be given in ascertaining whether any assets to which this Order applies are within their power, possession, custody or control and in complying with this Order and to indemnify any such person against all liabilities which may flow from such compliance;

(c) To give a copy of this Order to anyone notified of this Order by the Plaintiff's solicitors and to inform all 3rd parties notified and affected by this Order of their right to apply to the Court to vary or discharge the Order or for directions;

(d) Not to begin proceedings without the leave of this Honourable Court against the 2nd Defendant in any other jurisdiction or use information obtained as a result of an Order of the Court in this jurisdiction for the purpose of civil or criminal proceedings in any other jurisdiction;

(e) Not to without the leave of the Court seek to enforce this Order in any country outside Malaysia or to seek an Order of a similar nature including Orders conferring a charge or other security against the 2nd Defendant or the 2nd Defendant's assets;

IT IS HEREBY ORDERED:

1. That the 2nd Defendant whether acting by himself, his servants or agents or any of them, or otherwise howsoever be restrained by injunction until the final disposal of this suit or until further Order of this Honourable Court from selling, parting with, encumbering by way of security or otherwise, removing, disposing of, diminishing the value of and/or otherwise dealing with his assets in particular:

   (a) any monies in account number 816300 with Man Financial (S) Pte Ltd of 3 Philip Street, #09-02 Commerce Point, Singapore 048693 in the name of the 2nd Defendant or his claim thereto;

whether within the jurisdiction or otherwise and whether in his own name or not and whether solely or jointly owned in so far as the same does not exceed the sum of RM80,000,000.00;

2. That the 2nd Defendant, whether acting by himself, his servants or agents or any of them or otherwise howsoever do, within 7 days from the service of this Order disclose to the Plaintiff by way of a sworn affidavit the full value of his respective and/or joint assets identifying with full particularity the nature and details of all such assets and their whereabouts whether within the jurisdiction or otherwise and whether held in his own name or by nominees or otherwise on his behalf and whether solely or jointly owned; and

3. That the Plaintiff be granted leave to serve this Order outside the jurisdiction on Man Financial (S) Pte Ltd at 3 Philip Street, #09-02 Commerce Point, Singapore 048693;

4. Costs.

Dated this 13th day of March 2002.

Sgd (Illegible)
…
Deputy Registrar
High Court of Malaya
Kuala Lumpur

EXCEPTIONS TO THIS ORDER

1. This Order does not prevent the 2nd Defendant from spending RM1,000.00 a week towards his ordinary living expenses and RM1,000.00 a week towards his ordinary and proper business expenses and also RM1,000.00 a week on legal advice and representation.

   But before spending any money, the 2nd Defendant must tell the Plaintiff's solicitors from where the money is to come.

2. This Order does not prohibit the 2nd Defendant from dealing with or disposing of any of their assets in the ordinary and proper course of business;

3. The 2nd Defendant may agree with the Plaintiff's solicitors that the above spending limits should be increased or that this Order should be varied in any other respect but such agreement must be in writing.

EFFECT OF THIS ORDER

1. A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must do it through others acting on his behalf or with his encouragement.

2. A Defendant who is a corporation and which is ordered not to do something must not do it itself or by its directors, officers, employees or agents or in any way.

THIRD PARTIES

1. Effect of this Order.

It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be sent to prison, fined or have his assets seized.

2. Effect of this Order outside Malaysia.

The terms of this Order do not affect or concern anyone outside the jurisdiction of this Court until it is declared enforceable or is enforced by Court in the relevant country and then they are to affect him only to the extent they have been declared enforceable or have been enforced UNLESS such a person is:

(a) a person to whom this Order is addressed or an officer or an agent appointed by power of attorney of such a person; or

(b) a person who is subject to the jurisdiction of this Court and

(i) has been given written notice of this Order at his place of residence or place of business within the jurisdiction of this Court; and

(ii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this Order.

3. Set-off by Banks.

This injunction does not prevent any bank from exercising any right of set-off it may have in respect of any facility which it gave to the 2nd Defendant before it was notified of the Order.

4. Withdrawals by the 2nd Defendant.

No bank need enquire as to the application or proposed application of any money withdrawn by the 2nd Defendant if the withdrawal appears to be permitted by this Order.

DURATION OF THIS ORDER

1. This Order will remain in force up to the trial of this action or further order unless before then it is varied or discharged by a further Order of the Court.

VARIATION OR DISCHARGE OF THIS ORDER

1. Any one notified of this Order may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person) but anyone wishing to do so must first inform the Plaintiff's solicitors.

NAME AND ADDRESS OF PLAINTIFF'S SOLICITORS

1. The Plaintiff's solicitors are:
Messrs. Zul Rafique & Partners
Suite 17.01, 17th Floor
Menara Pan Global
8, Lorong P. Ramlee
50250 Kuala Lumpur
Malaysia
Tel: 03-20788228
Fax: 03-20341917

INTERPRETATION OF THE ORDER

1. Where there are 2 or more Defendants, then (unless otherwise stated):

(a) references to 'the Defendants' means both or all of them;

(b) an Order requiring 'the Defendants' to do or not to do anything requires each Defendant to do or not to do it; and

(c) a requirement relating to the service of this Order or any legal proceedings on 'the Defendants' means each of them.

INDORSEMENT ACCORDING TO ORDER 45 RULE 7 (4) RULES OF THE HIGH COURT 1980

If you the within-named, Ahmad Bin Hassan, neglect to comply with the terms of this Order or if required to do an act within a specified time, neglect to obey this Order within the time therein limited, you Ahmad bin Hassan shall be liable to process of execution for the purpose of compelling you to obey the same.

Dated this 13th Day of March 2002

Sgd (Illegible)
…
Deputy Registrar
High Court
Kuala Lumpur

This order is filed by Messrs. Zul Rafique & Partners Solicitors for the Plaintiff abovenamed with the address of service at Suite 17.01, 17th Floor, Menara Pan Global, 8 Lorong P Ramlee, 50250 Kuala Lumpur

Ref: (NN/JR/20228190)
Tel: 03-20788228
Fax: 03-20341917

The major complaint of the plaintiff was this. That the second defendant had failed to disclose to the plaintiff as required by the order of this court dated 13 March 2002, *inter alia*, the following:

(a) within 7 days from the service of the said order by way of a sworn affidavit whether acting by himself, his servants or agents or any of them or otherwise howsoever stating the full value of his respective and/or joint assets identifying with full particularity the nature and details of all such assets and their whereabouts whether within the jurisdiction or otherwise and whether held in his own name or by nominees or otherwise on his behalf and whether solely or jointly owned; and

(b) the source of his monies for each and every time he intends to spend a sum exceeding RM1,000.00 a week for each of his ordinary living expenses and RM1,000.00 a week towards his ordinary and proper business expenses and also RM1,000.00 a week for legal advice and representation.

The order of this court dated 13 March 2002 was duly served onto the second defendant on 6 June 2002. The affidavit of service evidencing the service of that order onto the second defendant had since been filed on 11 June 2002 as reflected in exh. "11-1" annexed to encl. 38. It is pertinent to note that leave had been granted by this court on 29 July 2002 as seen in encl. 37. Procedurally, everything was in order. Nothing was amiss.

All these salient facts were not disputed by the second defendant at all. The affidavits of the second defendant in encls. 47 and 48 did not dispute those facts as alluded to by me; it merely sought to explain as to why the second defendant did not obey the order of this court dated 13 March 2002 and it too sought to preserve the right of the second defendant to raise any preliminary objections pertaining to any part of the notice of motion in encl. 39 and to the statement made pursuant to O. 52 r. 2(2) of the RHC.

Arguments Of The Parties And The Expositions Of The Law

Mr. Shahul Hameed Amirudin submitted in earnest and he stressed that the second defendant had failed to comply with the order of this court dated 13 March 2002. He went into details and referred to the affidavit of Ismee bin Ismail in encl. 38. As a senior general manager in charge of finance, Ismee bin Ismail was certainly qualified to affirm the affidavit in encl. 38. In that affidavit, Ismee bin Ismail alluded to the existence of the court order dated 13 March 2002 and he too explained that the second defendant had failed to comply with that court order which failure was an act of contempt on the part of the second defendant and so he sought an order in terms of his notice of motion in encl. 39.

Mr. Shahul Hameed Amirudin then referred to the affidavit in reply of the second defendant as seen in encl. 47 and in that affidavit the second defendant explained the reasons as to why he could not obey the court order dated 13 March 2002. The second defendant averred in encl. 47 that on 15 January 2002 at about 12pm a group of officers from Bank Negara Malaysia (hereinafter referred to as the "first special investigation unit") raided his house at number 1, Jalan Bukit Setiawangsa 8, Taman Setiawangsa, 54200 Kuala Lumpur for purposes of investigations under and pursuant to the Exchange Control Act 1953. In that raid, the first special investigation unit confiscated important documents from the second defendant's house including log books, facsimile papers, envelopes containing important documents, account books, folders containing important documents, diskettes, bank statements, cheque books, files containing important documents, computer CPU's, modem, etc, etc. A search list marked as exh. "AH1" and annexed to encl. 47 was referred to and there it contained the particulars of the seizure by the first special investigation unit.

Again, earlier on, sometime on 15 January 2002 at 11.40am another group of officers from Bank Negara Malaysia (hereinafter referred to as the "second special investigation unit") raided the second defendant's office at Lot 2.1G, Jalan AU1/A4F, Keramat Permai Business Centre, 54200 Kuala Lumpur for purposes of investigations pursuant to the Exchange Control Act 1953. In that house raid, the second special investigation unit confiscated important documents from the second defendant's office, namely, a Bank Negara envelope containing important documents which include cheque books, all the ring files in the office, various statements of accounts, books in various forms, facsimile papers, other envelopes containing important documents, account books, folders containing important documents, diskettes, bank statements, cheque books, files containing important documents, all the computer CPU's in the said office, etc, etc. The search list pertaining to the office raid can be seen in exh. "AH2" of encl. 47.

The second defendant further averred in encl. 47 that the documents, files, diskettes, computer CPU's, modem, etc, etc which were listed in exhs. "AH1" and "AH2" of encl. 47 constituted material source of importance for him to refer to and to comply with the order of this court dated 13 March 2002. It was the stand of the second defendant that it was not his intention not to comply with the order of this court dated 13 March 2002 but rather it was impossible for him to comply with the said order because he was not in possession of those materials as alluded to in exhs. "AH1" and "AH2" of encl. 47. Those materials were, according to the second defendant, held and in the custody of the special investigation units of Bank Negara Malaysia. To date, it was said to be impossible for the second defendant to deal with his assets because of the investigations conducted by Bank Negara Malaysia on him as well as the order freezing all the assets that were connected to him. The second defendant verily believed that as a result of the two raids that were conducted on his house and office respectively on 15 January 2002 and coupled with the Bank Negara Malaysia's investigations on him, he did not have any source of reference to enable him to disclose to the plaintiff by way of a sworn affidavit disclosing the full value of assets that were connected to him and identifying with full particularity the nature and details of all his assets and their whereabouts whether within the jurisdiction or otherwise and whether held in his name or otherwise. The second defendant also averred that he did not have the capacity to withdraw any of his monies from the relevant banks for his ordinary living expenses, and for his ordinary and proper business expenses as well as for the legal advice and representation which he sorely needed. Of significance was the averment by the second defendant that he lived, day by day, out of the sympathy of his relatives.

The second defendant averred further that it was within the knowledge of the first defendant, namely, Metrowangsa Asset Management Sdn Bhd that investigations were being conducted by Bank Negara Malaysia and the Securities Commission on him. It was averred that Wan Zahari bin Wan Embong – the finance manager of the first defendant, and Mohamed bin Abdul Wahab – the executive director of the first defendant, had made written statements admitting to the fact that they knew that investigations were being conducted by Bank Negara Malaysia and the Securities Commission on the second defendant. Incidentally, both the written statements of these two personalities were exhibited and marked as exh. "AH3" of encl. 47. The first defendant too had by letter dated 29 January 2002 sent the written statements of these two personalities to the Securities Commission and that letter of the first defendant can be seen in exh. "AH4" of encl. 47. The second defendant deposed further and he verily believed that, at all material times, it was within the knowledge of the first defendant that he was being investigated by the Bank Negara Malaysia and the Securities Commission. He averred that it was

within the knowledge of the first defendant that they knew all along that the police was investigating him. That the first defendant had even lodged a police report at the commercial crimes division of the Royal Malaysian Police Headquarters at Bukit Aman on 18 March 2002 was even alluded to by the first defendant in its statement of defence as exhibited in exh. "AH5" of encl. 47. For all the reasons as stated in encl. 47, the second defendant averred that he had not committed any contempt of court as alleged by the plaintiff.

I will now refer to the supplementary affidavit of the second defendant as seen in encl. 48 and which Mr. Shahul Hameed Amirudin made references to in the course of his submission in open court. In encl. 48, the second defendant reiterated that due to the raids on 15 January 2002 by the special investigation units of Bank Negara Malaysia on his house and office, it was impossible for him to comply with the order of this court dated 13 March 2002. The second defendant was advised by his counsel to say that although he was unable to disclose exactly and completely all his assets yet in good faith and to prove his determination to respect this Honourable Court he stated that, to date, he owned a double storey terrace house at number 1, Jalan Bukit Setiawangsa 8, Taman Setiawangsa, 54200 Kuala Lumpur which was said to be his home and asset of which he was able to disclose to this Honourable Court. The second defendant believed that this Honourable Court should give due consideration to him for acting in good faith by his inability to comply with the order of this court dated 13 March 2002 due to the overwhelming reason that his house and office were raided on 15 January 2002 by the two special investigation units of Bank Negara Malaysia where a lot of important documents as well as computer CPU's were confiscated. For all these reasons, the second defendant averred that he had not committed any contempt of court as alleged by the plaintiff and he prayed that the plaintiff's notice of motion in encl. 39 be dismissed with costs.

Mr. Shahul Hameed Amirudin was most unhappy with the disclosure of a house as reflected in enclosure 48 and he submitted that that disclosure came too late in the day. According to him that disclosure came six months after the order of this court was made and three months after the order was personally served. He pointed out, quite rightly, that on the eve of the hearing of encl. 39 the second defendant proceeded to file and serve his supplementary affidavit in encl. 48. Mr. Shahul Hameed Amirudin then proceeded to refer to the affidavit in reply of the second defendant in encl. 47 where certain bank accounts were mentioned thereto. He submitted that the second defendant was dragging his feet in complying with the order of this court dated 13 March 2002. He even proceeded to submit, by way of an analogy, that even the Sultan of Brunei could disclose his assets well whereas the second defendant could not. He then referred to some authorities and I will now allude to them. In *Sukumaran Ramasamy v. Selva Rani Raman* [1999] 5 CLJ 458, the plaintiff

husband there had obtained an order of the court for access to the child of the marriage in question. The defendant wife failed to deliver the child as ordered. The plaintiff husband then sought to commit the defendant wife for failure to obey the said order. At p. 462 to p. 463 of the report, I had this to say:

> In my judgment, there was contempt by the defendant when she failed to deliver the said child to the plaintiff on the scheduled date. Order 52 of the Rules of the High Court 1980 ('RHC') governs committal proceedings. Order 52 r. 1(1) of the RHC states that the power of the High Court to punish for contempt of court may be exercised by an order of committal in Form 110. Order 52 r. 1(2) of the RHC is worded in this way (the relevant portion only):
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> (2) Where contempt of Court:
>
> (a) is committed in connection with:
>
> (i) any proceedings before the High Court;
>
> then, subject to paragraph (4), an order of committal may be made by the High Court.
>
> Order 52 r. 1(3) and (4) of the RHC are worded in this way:
>
> (3) Where contempt of Court is committed in connection with any proceedings in the High Court, an order of committal may be made by a Judge of the High Court.
>
> (4) Where by virtue of any written law the High Court has power to punish or take steps for the punishment of any person charged with having done anything in relation to a court, tribunal or person which would, if it had been done in relation to the High Court, have been a contempt of that Court, an order of committal may be made by a Judge of the High Court.
>
> The RHC empowers this court to punish the defendant for contempt. In *Mozley-Stark v. Mozley-Stark* [1910] p 190, the court there held that it would not hesitate to send to prison a person who deliberately takes the law into his own hands and defies an order of the court. It appears that on the authority of *Corcoran v. Corcoran* [1950] 1 All ER 495 where a person is so imprisoned he will only be released after he carries out the order in question.

Continuing further and at p. 463 to p. 464 of the report, this was what I said:

> In *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1995] 3 MLJ 549 SC, Wan Adnan FCJ (now Chief Judge Malaya) had this to say of contempt generally (see p. 574 to p. 575 of the report):
>
> But first, I like to say something on the standard of proof that is required to prove a charge in contempt of court proceedings. It is already well established that in contempt of court proceedings, proof must be proof

> beyond reasonable doubt, and that where there is a doubt the doubt ought to be resolved in favour of the person charged. In other words, the proof must be of the standard as is required in a criminal case.

In *Alligarh Municipal Board & Ors v. Ekka Tonga Mazdoor Union & Ors* AIR 1970 SC 1707, it was held:

> In order to bring home a charge of contempt of court for disobeying orders of courts those who assert that the alleged contemners had knowledge of the order must prove the fact beyond reasonable doubt … In case of doubt, however, the benefit ought to go to the person charged.

In *Loot Ting Yee v. Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors* [1982] 1 MLJ 321, the applicant had applied to the High Court to commit the respondents for the alleged contempt of court. The application was dismissed in the High Court and in the Federal Court. The applicant then applied for leave to appeal to the Yang DiPertuan Agong.

Suffian LP on behalf of the Federal Court said:

> With respect we are of the opinion that the learned trial judge's decision was in a criminal matter and therefore there is no right of appeal beyond the Federal Court.

In *Re Bramblevale Ltd* [1970] Ch 128, Lord Denning said:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him.

The learned counsel for the second appellant (third defendant) had submitted that the injunction order dated 9 February 1993 ought not to have been issued by the court because:

(1) a court would grant an injunction only to support a legal right (*Montgomery v. Montgomery* [1964] 2 All ER 22; [1964] 2 WLR 1036), and there was no legal right of the plaintiffs to be protected;

(2) the injunction granted was too wide, and an injunction must be precise (*Garden Cottage Foods v. Milk Marketing Board* [1983] 2 All ER 770; [1983] 3 WLR 143); and

(3) the injunction order was made without jurisdiction.

In my view, these points are not relevant in contempt of court proceedings. They are relevant and may be valid in proceedings to set aside the injunction. In the instant case, the interim injunction order was made *ex parte*. Until and unless it is set aside, the order is valid and must be obeyed. In my view, the

correct position is that once an interim injunction has been granted, it must be obeyed. If the person against whom the order is made feels that the injunction order ought not to have been made for any reason, he must apply to have it set aside. Until it is set aside, he must respect and obey it. (See *Wee Choo Keong v. MBf Holdings & Anor and Another Appeal* [1993] 3 CLJ 210).

After citing with approval the case of *Hadkinson v. Hadkinson* [1952] 2 All ER 567, this was what I said in *Sukumaran Ramasamy v. Selva Rani Raman (supra)* (see p. 465 to p. 466 of the report):

It must be emphasised that the wife in *Hadkinson v. Hadkinson, supra,* admitted the contempt complained of by the husband. The defendant in the present case also admitted that she had failed to comply with the order of this court and begged for mercy. In open court, the defendant unabashedly apologised. It was a profuse apology. An order of this court should not be defied with impunity. This was also the view of Lord Greene MR in *Gordon v. Gordon* [1946] 1 All ER 247 especially at p. 254 of the report:

> There is, of course, another matter of great importance, and that is that the orders of the court should be observed and that no litigant should be permitted to say that he feels strongly that the order is a wrong order and, therefore, will not obey it. I do, however, derive some satisfaction from the fact that, as Lord Greene M.R., has pointed out, the difficulties which may arise under this rule may be removed as a result of this case. The importance of the present case is due to the fact that we are dealing with the custody of a small child. The hearing of this appeal has been expedited. It was expedited because we were dealing with the liberty of the subject. There was a stage when counsel for the appellant told us it would be unnecessary after all to ask that the appeal should be expedited because the respondent was willing, and her counsel agreed that she was willing, that the matter should stand over, because she had no desire to be vindictive and was not anxious that the appellant should be sent to prison. Upon that this court took a course which very likely we should not have taken if the matter in dispute had merely been the detention of a chattel. As Lord Greene, M.R. then said, expressing the view of the whole court, we did not think it proper to postpone the matter, because it did not rest with the parties to say whether mercy should be extended or not. It was not a question whether the respondent was vindictive or not. It was a question ultimately for the court whether it would be content that its orders should be defied with impunity. That I mention because it emphasises the public importance of the matter.

Just like *Gordon v. Gordon, supra*, no harm has been done to the said child. Both parties dearly and truly love their only daughter. This is the redeeming feature in the present case. No custodial sentence was imposed by Low Hop Bing J in *Chung Onn v. Wee Tian Peng* [1996] 5 MLJ 521 but his Lordship imposed a fine of RM7,000 or two months' imprisonment in default of payment

thereof. I was more magnanimous in *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor* [1993] 4 CLJ 177, when I cautioned and discharged the first defendant for being in contempt of court. The defendant here cried when she apologised to this court. The defendant's counsel took the cue and she too cried although not copiously. Of course, the defendant's counsel could barely submit in that kind of charged and choked voice. It was an exhibition of emotional outburst. In a choked voice she was barely audible. I listened attentively and, at the end of the day, I cautioned and discharged the defendant.

Now, I have this to say. In *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor* [1993] 4 CLJ 177, I took the liberty of cautioning and discharging the first defendant there for being in contempt. Likewise, I too cautioned and discharged the defendant wife for being in contempt in *Sukumaran Ramasamy v. Selva Rani Raman (supra).*

Tun Abdul Hamid Omar, the Lord President in *Wee Choo Keong v. MBf Holdings Bhd. & Anor. And Another Appeal* [1993] 3 CLJ 210 aptly said at p. 212 of the report:

Obedience to Court Order

It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

And his Lordship Tun Abdul Hamid Omar proceeded to say (see p. 212 to p. 213 of the report):

It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further in the same proceedings for his own benefit unless and until he purged his contempt. The question which we have to determine in these appeals is the ambit of that general rule.

Appellants' Contention

It has been urged on us by Counsel for the appellants that there must first be a finding of contempt and a sentence passed on that finding before the rule can be invoked; the argument being that the party alleged to be in contempt is not in a position to 'purge' his contempt until sentence has been passed. It has also been urged on us that an exception to the general rule exists where the party alleged to be in contempt was applying to set aside the very order of which he is said to be in contempt. *Astro Exito Navegacion SA v. Southland Enterprise Co. Ltd. and Nan Jong Iron and Steel Co. Ltd.* [1981] 2 LIR 595 and the judgment of Romer LJ in *Hadkinson v. Hadkinson* [1952] P 285 were amongst the authorities cited in support of the exception.

Finding

We are unable to accept that any exceptions *per se* exist to the general rule that a party in contempt cannot be heard until he has purged his contempt. We are in favour of the views expressed by Denning LJ in *Hadkinson (supra)* that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt. This flexible approach to the jurisdiction is based upon a discretion to be exercised in accordance with the circumstances of the case which was accepted by the House of Lords in *X Ltd. & Anor. v. Morgan-Grampian (Publishers) Ltd. & Ors.* [1990] 2 All ER. The recent decision of Abdul Malek J in *Instituto Bancario San Paolo Di Torina SPA v. Colour Touch Sdn. Bhd. & Anor.* delivered on 5 February 1993 (see [1993] 3 CLJ 34) was cited in support of the proposition that the rule would only apply where a writ of attachment or order of committal had been made. In our judgment, such a qualification on the application of the rule would be to place an unnecessarily low burden of obedience on the offending party. The rationale for the rule is public policy. Orders of Court must be treated with respect and require strict obedience.

Mr. Shahul Hameed Amirudin highlighted all these cases with enthusiasm and he stressed that if the second defendant was unable to file the required affidavit the least the second defendant could do would be to come before this court and ask for time. He submitted that the second defendant should explain to this court about the failure to comply with the court order dated 13 March 2002. He submitted that the second defendant should have written to Bank Negara Malaysia and explained the need to comply with the court order. He pointed out that the second defendant cannot come to court and defied the court order with impunity and then filed the supplementary affidavit in encl. 48 just one day before the hearing of encl. 39.

In *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor (supra)*, I took into consideration the case of *Tiu Shi Kian & Anor v. Red Rose Restaurant Sdn Bhd* [1984] 1 CLJ 325; [1984] 2 CLJ (Rep) 543 which case was also referred to me by Mr. Shahul Hameed Amirudin in the course of his submission before me. In *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor (supra)* at p. 182 to p. 183 of the report, this was what I said:

Proof of mens rea

I wholeheartedly agree with Wan Mohamed J. in *Tiu Shi Kian Anor v. Red Rose Restaurant Sdn. Bhd. (supra)* when his Lordship said that the matter had been settled in *R v. Odhams Press Ltd.* [1956] 3 All ER 494, in that *mens reas* need not be proved in contempt proceedings.

Punishment for contempt

It is my judgment that the first defendant had blatantly violated the Court Order and hence, is in contempt of Court. Learned Counsel for the first defendant strongly urged this Court to be lenient with the first defendant. It was said

that the first defendant had purged his contempt by apologising to this Court in his affidavit. Now, for the offence of contempt of Court the punishments may be as follows:

(1) a fine of unfixed amount (see *Elliot v. Klinger* [1967] 3 All ER 141); or

(2) a term of imprisonment of unfixed period (see *Burdett v. Rockley* [1682]) 1 Vern 58; *Dixen v. Rowe* [1876] 36 LT 548); or

(3) both fine and imprisonment; or

(4) caution and discharge.

The Court is also entitled to require the contemner to pay the costs of the application.

The first defendant is present in Court and through his Counsel has shown remorse over his violation of the Court Order. After taking into account all the factors in his favour and weighing that with the hassle which the plaintiff had to go through when the police investigated him, I feel that this is a fit case to temper justice with mercy. In the circumstances, I caution and discharge the first defendant. I also order the first defendant to pay the costs of this application. However, I must signal a warning that should offences of this nature be committed in the future, in this Court, by persons in the same or similar position as the first defendant, similar leniency will certainly not be extended.

Order accordingly.

In regard to the test for contempt, I need only to refer to the case of *Murray Hiebert v. Chandra Sri Ram* [1999] 4 CLJ 65 where the Court of Appeal agreed with the test as applied by the learned trial judge and the test as adopted by the learned trial judge was stated at p. 81 of the report in this way:

He referred this court to p 117 of the appeal record wherein the learned trial judge, in his judgment, stated at p 271 of *Chandra Sri Ram v. Murray Hiebert* [1997] 3 MLJ 240 (HC):

> To constitute contempt of court, it is not necessary to prove affirmatively that there had been an actual interference with the administration of justice by reason of offending statements. It is enough if it is likely or it tends in any way to interfere with the proper administration of justice (per Dua CJ in *Brig ET Sen (Retd) v. Edatata Narayanan & Ors* [1969] AIR Delhi 201).

And the Court of Appeal dismissed the appeal against conviction and reduced the sentence from three months to six weeks imprisonment. The appellant was also ordered by the Court of Appeal to pay the costs of the appeal.

Flowing from all these, Mr. Shahul Hameed Amirudin submitted that the excuses that were advanced in encls. 47 and 48 were unpalatable. He stressed that the language employed in the two affidavits in encls. 47 and 48 did not show respect to this court. He too pointed out that there were no mitigating grounds for this court to exercise any discretion in favour of the second defendant. He then moved that the contemnor – referring to the second defendant, to purge his contempt.

Mr. Shahruddin Osman assisted by Mr. Baharin Rejab for the second defendant responded and he submitted that this court should give full consideration to the supplementary affidavit of the second defendant in encl. 48 even though the disclosure was not complete and did not contain the full particularity of the assets of the second defendant. It was part and parcel of Mr. Shahruddin's submission that the second defendant had made every effort to disclose to this court his assets. He submitted that the second defendant could have declared the house as stated in enclosure 48 much earlier but such disclosure would not be sufficient and the plaintiff would still persist in citing the second defendant for contempt. He then drew my attention to the case of *Re Bramblevale, Ltd* [1969] 3 All ER 1062 a decision of the English Court of Appeal (Lord Denning MR, Winn and Cross LJJ) where Lord Denning MR aptly said at p. 1063 of the report to the following effect:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.

And using the above salient passage, Mr. Shahruddin submitted that contempt must be proved beyond reasonable doubt and that it was not sufficient for the plaintiff to conduct a contempt proceeding of this nature in a summary manner. Mr. Shahruddin further submitted that Ismee bin Ismail – the deponent of the affidavit in encl. 38, was not present in court today and he further submitted that Ismee bin Ismail should give evidence in the witness box in order to prove that the second defendant had committed contempt of the court order dated 13 March 2002. Mr. Shahruddin also referred to the case of *Gur Diyal v. Sukhnandan Lal* [1929] AIR Allahabad 236 in particular to the speech of Dalal J at p. 237 which said that:

> The evidence of a witness cannot be admitted until the opposite party had an opportunity of cross-examining him.

He further elaborated by submitting along these lines. That the present proceeding was in the nature of a criminal proceeding where witnesses must be called to give evidence and later the second defendant would be given the opportunity to cross-examine the witnesses called by the plaintiff. That in a

criminal proceeding, documentary evidence has to be tendered and marked accordingly as an exhibit. That in the context of the present exercise, no evidence was led by the plaintiff through the relevant witnesses.

Mr. Shahruddin then referred to the case of *Dean v. Dean* [1987] 1 FLR 517, a decision of the Court of Appeal (Dillon, Stephen Brown and Neill LJJ), and he relied on the speech of Dillon LJ at p. 520 which reads as follows:

> So far as the point of law is concerned, it has long been the view that proceedings for civil contempt of court are not ordinary civil proceedings. In the case of *Danchevsky v. Danchevsky (No. 2)* (unreported), decided on 10 November 1977, Lawton LJ pointed out that contempt of court is a common law misdemeanour and the criminal nature of the charge has been taken into account many times. The case usually referred to as establishing this is the decision of this court in *Re Bramblevale Ltd* [1970] Ch 128. There Lord Denning MR said (at p. 137A):
>
> > A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.

and he also emphasised and highlighted Dillon LJ's judgment at p. 520 which reads as follows:

> In *Yianni v. Yianni* [1966] 1 WLR 120 Cross J had earlier set out clearly that the test was proof beyond reasonable doubt. In the *Bramblevale* case that was common ground between counsel for the parties, but the case is still important because it was concerned with the burden of proving guilt beyond reasonable doubt instead of merely relying on inference. So, even though it was not in dispute that the burden of establishing contempt by the criminal standard lay on the person seeking committal, the case involves a decision as to the extent of the burden in so far as it was not possible to rely on presumptions.

Again, relying on the case of *Dean v. Dean (supra)*, Mr. Shahruddin referred to the judgment of Stephen Brown LJ which reads as follows (see p. 522 of the report):

> It is clear that the principle that a contempt must be proved beyond reasonable doubt is settled law.

and he too relied on the passage of the same case in the judgment of Neill LJ where his Lordship said at p. 523 of the report:

> It is to be remembered that contempt of court, whether civil or criminal, is a common law misdemeanour. Furthermore, there are many authorities, of which the decision in *Re Bramblevale Ltd* [1970] Ch 128 is an authoritative example, to the effect that proceedings for contempt of court are criminal or quasi-

criminal in nature and that the standard of proof to be applied is the criminal standard. I can see nothing in the speech of Lord Scarman in *R v. Secretary of State for the Home Department ex parte Khawaja* [1984] AC 74 to throw doubt on the proposition that the standard of proof is the criminal standard.

Mr. Shahruddin then rounded up his submission to the effect that the plaintiff had not discharged its burden to prove their case beyond reasonable doubt. Mr. Shahruddin refused to give up. He continued further. He submitted that the way Mr. Shahul Hameed Amirudin conducted the contempt proceeding in a summary way was akin to an O. 14 application. He submitted that the evidence thus far adduced was from the bar and it consisted of inferences and presumptions. He submitted that the second defendant was interested in discharging his burden according to the criminal standard. He then referred to the raids that were conducted on the house and office of the second defendant as alluded to in the early part of this judgment and he said that he proposed to call the raiding officers to the stand. He submitted that as a result of those raids important articles were seized and so it was impossible for the second defendant to comply with the court order dated 13 March 2002 in order to disclose in full all the assets and its value. He submitted that if the second defendant were to write to Bank Negara Malaysia as well as to the Securities Commission and asking them to return those documents that were seized, it would amount to an interference with their investigations. He then sought to draw an analogy with what had happened to the former Deputy Prime Minister ("DPM") Dato' Seri Anwar Ibrahim when the former DPM interfered with police investigations. He emphasised that the former DPM was jailed for six (6) years for interfering with the police investigations and he would not adopt that kind of approach for the second defendant. Mr. Shahul Hameed Amirudin was not pleased with the submission of the learned counsel for the second defendant and he submitted that he was not suggesting that the second defendant "gemparkan investigation" like what the former DPM did. Mr. Shahul Hameed Amirudin suggested that the second defendant should write to the Bank Negara and tell them about his predicament in the face of the court order dated 13 March 2002. Mr. Shahul Hameed Amirudin then submitted along these lines. That the non-compliance with the court order was an admitted fact and was contempt in itself. That the law says that if the court makes an order then there must be compliance. It is said that compliance is a pre-requisite. That the second defendant has done nothing to show compliance. That the second defendant was in contempt and he must purge his contempt. That there was no indication of remorse in the second defendant's affidavits be it in encl. 47 or even in encl. 48.

Now, in regard to the procedure as adopted by the plaintiff, I have this to say. It was a procedure that was on all fours with the case of *Murray Hiebert v. Chandra Sri Ram (supra)* where the notice of motion and the statement

were said to be in perfect order. Likewise here, the scenario was also the same. There was nothing wrong in the notice of motion and the statement made pursuant to O. 52 r. 2(2) of the RHC. On the procedure, I had this to say in *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor (supra)*, particularly at p. 182 of the report:

> There must be clear proof that the terms have been broken and breach must be proved beyond all reasonable doubt
>
> It is now settled law that in contempt proceedings, the standard of proof is one beyond reasonable doubt. The *locus classicus* on this point is the case of *Re Bramblevale Ltd.* [1970] Ch 128; [1969] 3 All ER 1062, 1063, where Lord Denning MR had this to say:
>
> > A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt.
>
> Now, since the colour and texture of a contempt of Court is criminal in nature, it follows therefore that the standard of proof should be strict just like a criminal case. The requirements of strict proof in a criminal case as set out in *Sia Soon Suan v. Public Prosecutor* [1966] 1 MLJ 116 FC should be adhered to.
>
> I am mindful of the salutary advice by Gill CJ Malaya (as he then was) in *Tay Seng Keng v. Tay Ek Seng Co. Sdn. Bhd.* [1978] 1 MLJ 126 FC, that it was quite impossible to say on a mere consideration of evidence given on affidavits that the guilt of the appellant had been proved beyond reasonable doubt and, consequently, the appellant's imprisonment, in that case, for contempt of Court could not be sustained. But the facts in the present application are entirely different in that they are clear as crystal and, for fear of being repetitive, the affidavits of both parties clearly point to the breaches of the Court Order by the first defendant beyond all reasonable doubt. The affidavit of the first defendant shows that he had acted under the guise and pretence of ignorance when he entered Lot 76. In fact, the first defendant apologized to this Court in his short affidavit affirmed on 16 July 1993 and this would clearly differentiate *Tay Seng Keng*'s case *(supra)* with the present application. I had occasion to say in *Lye Fong Weng & Anor. v. Deputy Minister of Home Affairs & Anor.* (Criminal Applications No: 44-6-93 & 44-7-93) that: 'After all, it had been said that sometimes the truth seeps out of an affidavit.' This would certainly be the case here. The truth simply oozed out from the affidavits of both parties.

Likewise here, the notice of motion together with the affidavit in support in encl. 38 of Ismee bin Ismail contained the relevant particulars which would enable the second defendant to know what the alleged contempt was against him. Even the order of this court dated 13 March 2002 was exhibited as an exhibit which was annexed to the affidavit in support in encl. 38 and that order was the foundation stone of the present committal proceeding against the second defendant.

Traditionally, contempts are classified as being either civil or criminal. A civil contempt is committed where there is disobedience to a court judgment or order either to do or to abstain from doing a particular act. A criminal contempt occurs where there is an interference with the due course of justice like jeopardising the fair hearing of a trial or to deter or frighten witnesses or to interrupt court proceedings or impairing public confidence on the integrity of the administration of justice. In *Halsbury's Laws of Malaysia*, vol. 2, at p. 75 there is a write up on contempt of court and it is worded in this way:

> Definition of contempt of court The Federal Court, the Court of Appeal or a High Court has power to punish any contempt of itself (Federal Constitution art 126). The term 'contempt of court' has not been defined in the Federal Constitution. Therefore, it is for the courts to define what is contempt of court. A simple case of contempt arises when a court order is not obeyed, or is disobeyed. A person against whom an order of court has been issued is duty bound to obey that order until it is set aside. He cannot decide for himself whether the court order was wrongly issued and so need not be obeyed. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey the order of the court commits contempt of court. The court has thus emphasised that orders of the court must be treated with respect and that they require strict obedience (*Wee Choo Keong v. MBf Holdings* [1993] 3 CLJ 210, SC, per Abdul Hamid Omar LP).
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> Courts accept that judicial decisions may be subjected to fair criticism, in good faith, without attributing improper motives to the judges (See *Ambard v. A-G for Trinidad and Tobago* [1936] AC 322 at 335, [1936] 1 All ER 704 at 709, PC, where Lord Atkin said, 'Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men'). Thus, criticism of court decisions which does not amount to scandalising the court is not regarded as contempt of court (As to scandalising the court see *A-G, Malaysia v. Manjeet Singh Dhillon* [1991] 1 CLJ 216; [1991] 1 CLJ (Rep) 22, SC.) Remarks may also fall within the limits of free speech and not amount to contempt of court (The courts should not generally be over-sensitive to criticism: *Lim Kit Siang v. Dato' Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383, SC).
>
> It is paramount, in the interest of the public, that every court has power and jurisdiction to punish persons who scandalise it or disobey orders made by it. If such a power is absent, then the public will lose confidence in the authority of the courts, leading to anarchy and disorder. This is the juridical basis for the law of contempt (*MBf Holdings Bhd v. Houng Hai Kong* [1993] 2 MLJ 516 (failure to comply with an *ex parte* interlocutory injunction restraining defendants from printing or circulating any allegation of impropriety and illegality by the plaintiffs held to be contempt of court)).

Here, in the context of the present exercise, the contempt was civil in nature. This was beyond doubt. The contemnor in the person of the second defendant was certainly entitled to be heard (*Hadkinson v. Hadkinson* [1952] 2 All ER 567 CA). Indeed, O. 52 r. 5(4) of the RHC gives that leeway to the second defendant where it states:

> If on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so.

And it was the wish of the second defendant to give evidence in the witness box under oath. I acceded to his wish. Under oath, the second defendant described the raids that were conducted on his house and his office on 15 January 2002 and he too explained the seizures of those documents. The two search lists were tendered as exhs. "D1" and "D2" respectively. He testified that he was:

> Terkejut, tertekan, runsing dan amat susah hati sehingga sekarang.

He testified that he was unable to comply with the order of this court dated 13 March 2002 because all those documents including his land titles were confiscated by the officers from Bank Negara Malaysia. He then apologised and this was what he said:

> Saya merasa amat sedih dan terkilan dan merasa ingin memohon berbanyak maaf kepada Mahkamah yang mulia ini.

Under cross-examination, the second defendant testified that in the event this court allowed him time to file an affidavit adverting to his assets, he would be able to do so and that would be dependent on when the investigations would complete and when would the documents be handed back to him. He admitted that between the month of March 2002 until today he had gone to Singapore but he was unable to provide the exact date of his visit to Singapore. He agreed that the search list in exh. "D1" showed the existence of his bank accounts. He admitted that the reference to United Overseas Bank Ltd in exh. "D1" was in relation to the bank in Singapore. He admitted that items 4.25, 4.27 and 4.28 of exh. "D1" showed his accounts in Singapore. He too admitted that at item 2 of exh. "D2", it showed his accounts in Kuala Lumpur. He testified that from 13 March 2002 until today he did not withdraw any monies from his bank accounts. He testified that when he was in Singapore and on the advice of his lawyer he did not transact any banking business with the banks in Singapore. He testified that till today he has yet to write officially to the police and to Bank Negara Malaysia pertaining to the documents that were seized from his house and from his office.

Under re-examination, the second defendant testified that he proceeded to Singapore in order to terminate the tenancy agreement of his office premises at Ocean Tower located at Raffles Place because in the light of his predicament he had to close his Singapore's office.

Now, factually speaking the court order dated 13 March 2002 as reproduced in the early part of this judgment restrained the second defendant from "removing, disposing of, diminishing the value of and/or otherwise dealing with his assets" in relation to the sum of RM80 million. That is indeed a mind boggling figure. It was widely reported in the local dailies and it created a fiasco of a sort.

The chronology of events were not favourable to the second defendant. I will now itemise the events in chronological order:

(1) On 13 March 2002, the court gave an order according to the terms as applied by the plaintiff.

(2) Within seven (7) days from the service of the court order dated 13 March 2002, the second defendant must disclose by sworn affidavit his assets thereto.

(3) On 6 June 2002, the court order dated 13 March 2002 was duly served onto the second defendant. By 12 June 2002, the second defendant should have sworn an affidavit declaring his assets and he failed to do so. The second defendant was thus in contempt for his failure to comply with the court order dated 13 March 2002. It was as simple as that.

(4) The second defendant by way of a supplementary affidavit as seen in encl. 48 declared a house as his asset. Enclosure 48 was affirmed on 17 September 2002 and filed on the same date at 2.32pm. Calculation wise there was a delay of three months and five days before the second defendant declared his house as his asset and that too was not complete. The delay was certainly acute because the hearing of encl. 39 began on 18 September 2002. There was no redeeming feature in favour of the second defendant at all. The second defendant saw it fit not to inform Bank Negara Malaysia, the police and the Securities Commission about his legal duty under the court order dated 13 March 2002.

Mr. Shahruddin submitted that the second defendant was not in his correct frame of mind after the two raids on his house and office respectively. He submitted that the second defendant should be given another chance so that compliance with the court order could be made possible. He sought a reasonable period of time and after consulting the second defendant it was suggested that a period of three months should be given to the second

defendant to enable him to comply with the court order. In serious tone, Mr. Shahruddin sought to draw a parallel with the case of *Re Bramblevale, Ltd (supra)*, in particular he relied on the passages in the judgment of Lord Denning MR as seen at p. 1063 which read as follows:

> In May 1969 a summons was taken out asking for him to be committed to prison for contempt of court for not producing the books in accordance with the registrar's order on 19th November 1968. It came before MEGARRY, J., in June 1969. The appellant swore an affidavit and was cross-examined on it. He said that he had had these two particular books, the cash book and the creditors' ledger, in his possession since 24th October 1967; they had been in the boot of his car; they got soaked in petrol; the police had come along and removed the books; and the books had found their way into the dustbin. If that story were true, he would not be guilty of contempt because the books would not have been in his possession or control in November 1968 when the registrar made his order.

and he submitted that the second defendant too should not be guilty of contempt. But Mr. Shahruddin should have referred to the following passages in the judgment of Lord Denning MR in the case of *Re Bramblevale (supra)* which showed that Megarry J had sentenced the appellant there to prison for an indefinite period of time for telling a "cock and bull story". This was what Lord Denning MR had said in *Re Bramblevale, Ltd* (see the judgment at p. 1063 thereof):

> But MEGARRY, J., did not believe the appellant. He thought that it was a cock and bull story. The judge formed the conclusion that the appellant kept the books after the accident on 25th September 1967 and still had them on 19th November 1968 (when the registrar made his order) and also on 26th November 1968 (which was the latest time for delivering them up). The judge found that the appellant was guilty of contempt of court. He committed him to prison for an indefinite time. The judge had the praiseworthy object of inducing the appellant to produce the books.
>
> On 2nd July 1969 the appellant applied to be released from prison. The judge refused to release him. The judge realised that the appellant might have destroyed the documents. He said that:
>
> > … there are only two possibilities … either he still has them, or else he no longer has them, whether by reason of loss, destruction, transfer to someone else or otherwise…
>
> If he still has them, he ought to hand them over. If he had destroyed them, he would be guilty of an offence under the Companies Act 1967. The judge said that if the appellant has 'by his own voluntary act, put himself in difficulties … he has only himself to blame'. So the judge held that the appellant was still in contempt. The appellant appeals to this court.

Megarry J was an effective judge. His Lordship jailed the appellant there so as to induce "the appellant to produce the books." It was certainly an effective approach. A laudable approach, worthy of praise. According to Reid LJ in *A.G. v. Times Newspapers Ltd* [1974] AC 273 at 294, [1973] 3 All ER 54 at 60 that the law of contempt of court is a development of the common law and is founded entirely on public policy. I venture to say that the power to punish for contempt of court exists to ensure basically that justice shall be seen to be done and at the same time to preserve the integrity of the courts. Be that as it may, Mr. Shahruddin too should have referred to the final passages in the judgment of Lord Denning MR in *Re Bramblevale, Ltd* where his Lordship said at p. 1063 to p. 1064 of the report:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. Take this very case. The appellant told a lie when he said that the books were damaged and lost in the car accident on 25th September 1967. That lie does not prove that the appellant kept those books for a further year and still had them in his possession from 19th to 26th November 1968. He may have told the lie for another purpose – to conceal the fact that he destroyed the books himself shortly after the car accident. That would be a criminal offence, but not the one with which he is charged.
>
> On this charge, the court has to see whether there is sufficient evidence that the appellant did have these books in the week of 19th to 26th November 1968. On his own confession, he had them on 25th September 1967, but there is nothing more. That confession leaves two possibilities: either that he had them on that date in November 1968, and wrongfully refused to deliver them, or, alternatively, he got rid of them before that time so that he could not deliver them. Those two possibilities are equally likely. It is not possible to say which of them is correct. The court cannot be satisfied beyond reasonable doubt that he still had the books in November 1968. That would be conjecture rather than inference – surmise rather than proof. Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt. The appellant's conduct in telling lies was very reprehensible. But it is not sufficient ground for holding that he committed contempt of court about these two books. No doubt he was guilty of a contempt in not delivering the other papers in the seven days. He has been long enough in prison for that. I would allow the appeal. The appellant can be released forthwith.

and these passages showed that the doubt was given for the benefit of the appellant there and so the appellant there was released from prison and the appeal was allowed. Here, in the context of the present case, the facts were

entirely different. Both the raids on the second defendant's house and office took place on 15 January 2002 at different times. Whereas the court order was dated 13 March 2002 – some one (1) month and 28 days later. Both the raids were in fact conducted and this can be verified by the two search lists marked as exhs. "D1" and "D2". It was not a "cock and bull story" like what Megarry J perceived of the appellant in *Re Bramblevale, Ltd*. It was a true story. It really happened. Now, what should the second defendant do when he was confronted with the court order dated 13 March 2002 and which order was served on him on 6 June 2002? The second defendant should have expeditiously affirmed an affidavit and filed it in court on or before 12 June 2002 alluding to the seizure of those documents during the raids on 15 January 2002 and declared that terrace house to be his and at the same sought for further time to declare all his remaining assets. Instead, the second defendant played possum and he only filed the affidavit in enclosure 47 after the notice of motion in encl. 39 was filed on 12 August 2002 and after the affidavit in support in encl. 38 was filed on 12 August 2002. And one day before the hearing of the notice of motion in encl. 39, the second defendant filed the supplementary affidavit in encl. 48 on 17 September 2002 declaring that terrace house. Was this an act of a repentant contemnor? It was certainly not. To make matters worse, no apologies were extended in the affidavits in encl. 47 and in encl. 48. In fact, the second defendant should have affirmed and filed an affidavit apologising for his contempt and stating what steps he had taken to purge it or explaining why he had not purged it and why nevertheless no committal order should be made (*Heatons Transport (St Helens) Ltd v. Transport and General Workers' Union* [1973] AC 15 at 33, [1972] 2 All ER 1214 at 1234, CA). Nothing of that sort was done. The learned counsel for the second defendant should have advised him about the dire consequences of committal proceedings. Sir John Donaldson in *Howitt Transport v. Transport and General Workers' Union* [1973] 1 CR 1 at p. 10 aptly said that:

> orders of any court must be complied with strictly in accordance with their terms. It is not sufficient by way of answer to an allegation that a court order has not been complied with for the person concerned to say that he 'did his best'. But if a court order requires a certain state of affairs to be achieved the only way in which the order can be complied with is by achieving that state of affairs.

Russell LJ in *Knight v. Clifton* [1971] Ch 700 at 707, [1971] 2 All ER 378 at 381 dutifully followed *Re Bramblevale, Ltd* and there his Lordship said:

> Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent.

Liability for breaching a court order, like the present case at hand, is certainly strict. Lord Oliver puts it nicely in the case of *A.G. v. Times Newspapers Ltd* [1992] 1 AC 191 at 217, [1991] 2 All ER 398 at 414 to 415:

> in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound by that which is prohibited.

Conclusion

For all the reasons as alluded to above, it was part and parcel of my judgment that the contemnor – the second defendant, was in contempt of the court order dated 13 March 2002. But I took into account and accepted the apology advanced by the second defendant when he took the stand in the witness box. An apology from the contemnor was accepted by the Court of Appeal in *Lee Chan Leong v. Jurutera Konsultant (SEA) Sdn Bhd & 5 Ors* [2002] 4 CLJ 1 and I likewise was magnanimous in the circumstances of this case, to accept the apology of the second defendant even though it came too late in the day. But I must warn the second defendant that he must not thumb at the order of this court dated 13 March 2002 and that he must obey that order without questioning its wisdom. Obedience must be exhibited by him dutifully and he must not repeat that disobedience again. With that in mind, the second defendant was directed to comply fully with the order of this court dated 13 March 2002 especially in regard to that part as seen at p. 26 of encl. 38 – which I have read in open court and which had been reproduced earlier in this judgment, within a period of two months calculated from today – meaning on 18 September 2002. In default thereof, the plaintiff be given the liberty to cite the second defendant, once again, for contempt and in so doing the whole rigmarole in moving the machinery of contempt must be complied by the plaintiff. I too ordered that costs be awarded to the plaintiff in any event.